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No. 82-565

In the Supreme Court of the United States

OCTOBER TERM, 1982

JEFFREY R. MACDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial judge abused his discretion in excluding hearsay testimony as to the out-of-court statements of a defense witness, proffered under Fed. R. Evid. 804(b)(3), on the ground that corroborating circumstances did not clearly indicate their trustworthiness.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Federal rule involved 1

Statement 2

Argument 9

Conclusion 17

TABLE OF AUTHORITIES

Cases:

Chambers v. *Mississippi*, 410 U.S. 284 ..... 14, 15, 16

United States v. *Alvarez*, 584 F.2d 694 10

United States v. *Atkins*, 558 F.2d 133, cert. denied, 434 U.S. 929 ..... 10, 11

United States v. *Beltempo*, 675 F.2d 472 12

United States v. *Goodlow*, 500 F.2d 954 11

United States v. *Guillette*, 547 F.2d 743, cert. denied, 434 U.S. 839 10

United States v. *Hinkson*, 632 F.2d 382 16

United States v. *Lang*, 589 F.2d 92 12

United States v. *Palumbo*, 639 F.2d 123, cert. denied, 454 U.S. 819 ..... 10, 12

United States v. *Poland*, 659 F.2d 884, cert. denied, 454 U.S. 1059 ..... 10, 12

United States v. *Satterfield*, 572 F.2d 687, cert. denied, 439 U.S. 840 ..... 10, 11

Page

Cases—Continued:

United States v. *Sheard*, 473 F.2d 139, cert. denied, 412 U.S. 943 10

United States v. *Thomas*, 571 F.2d 285 11

Constitution, statutes and rule:

United States Constitution:

Fifth Amendment:

Double Jeopardy Clause 2

Due Process Clause 15

Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.* :

Article 30, 10 U.S.C. 830 4

Article 32, 10 U.S.C. 832 4

18 U.S.C. 1111 2

Fed. R. Evid. :

Rule 804 1

Rule 804(b)(3) ..... *passim*

Miscellaneous:

H.R. Rep. No. 93-650, 93d Cong., 1st Sess. (1974) 10

4 J. Weinstein & M. Berger, *Weinstein's Evidence* (1977) 12

4 J. Weinstein & M. Berger, *Weinstein's Evidence* (1981) 11

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 688 F.2d 224. The opinion of the district court (Pet. App. 26a-49a) denying petitioner bail pending appeal is reported at 485 F. Supp. 1087.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25a) was entered on August 16, 1982. The petition for a writ of certiorari was filed on September 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C 1254(1).

RULE INVOLVED

Rule 804 of the Federal Rules of Evidence provides in pertinent part:

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * * *

(3) **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on one count of first degree murder and two counts of second degree murder, in violation of 18 U.S.C. 1111. He was sentenced to three consecutive terms of life imprisonment. The court of appeals affirmed (Pet. App. 1a-24a).[1]

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[1]Prior to trial, petitioner had taken an interlocutory appeal from the district court's denial of his motion to dismiss on speedy trial grounds. The court of appeals reversed and remanded with instructions to dismiss the indictment (531 F.2d 196 (1976)), but this Court reversed that decision on the ground that an interlocutory appeal may not be taken from a denial of a motion to dismiss on speedy trial grounds (435 U.S. 850 (1978)). On remand, the court of appeals held that a trial would not violate the Double Jeopardy Clause. 585 F.2d 1211 (1978). After trial, the court of appeals reversed petitioner's convictions on the ground that his right to a speedy trial had been violated. 632 F.2d 258 (1980). This Court reversed and remanded (No. 80-1582 (Mar. 31, 1982)), and petitioner now seeks review of the affirmance of his convictions on remand.

1. In the early morning of February 17, 1970, when petitioner was a physician holding the rank of captain in the United States Army Medical Corps, petitioner's pregnant wife, Colette, and two daughters, Kimberly and Kristen, were bludgeoned and stabbed to death in his quarters at the Fort Bragg military reservation.[2] Petitioner summoned the military police and stated that a band of four "hippies" had broken into his house and stabbed him. He described the intruders as two white males, a negro male who wore an army field jacket with sergeant's stripes, and a blonde female who wore boots and a floppy hat, carried a candle, and chanted "acid is groovy, kill the pigs" (Tr. 1262, 1270).[3]

The following day, Prince E. Beasley, a local policeman, visited Helena Stoeckley, who was involved in the local drug culture and who had served as a police informer. Beasley told her that she and several of her male companions fit petitioner's description of the murderers, and he asked whether she had any information concerning the crimes. Stoeckley responded (J.A. 1223): "In my mind, it seems that I saw this thing happen." She added, however, that she was "heavy on mescaline" and did not recall anything that occurred on the night of the murders (J.A. 1223, 1228). Stoeckley was also questioned by an Army investigator.

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[2]The evidence presented by the government at trial to establish petitioner's guilt primarily was physical evidence that demonstrated the falsity of petitioner's exculpatory story and showed that he committed the murders and then rearranged the crime scene to make it appear that the murders had been committed by intruders. Some of this evidence is set forth at pages 3-7 of the government's brief in No. 80-1582. Because the sufficiency of the evidence is not in issue here, we will not repeat this recitation.

[3]"Tr." refers to the trial transcript. "J.A." refers to the joint appendix in the court of appeals.

2. On May 1, 1970, petitioner was charged with murder pursuant to Article 30 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 830, and an officer was appointed to conduct a formal investigation of the charges in accordance with Article 32 of the UCMJ, 10 U.S.C. 832, to determine whether they should be referred to a general court-martial for trial. During the Article 32 hearing, some evidence was presented concerning the possibility that Stoeckley was connected with the murders. William Posey, a former neighbor of Stoeckley's, testified that he had seen her arrive home in the early morning of February 17, 1970, in a car occupied by several males, and that she sometimes wore a blonde wig and a floppy hat, although she was not wearing them on that occasion (Art. 32 Tr. 1298-1302). He further stated that, about a week after the murders, Stoeckley told him that she had been questioned by the police concerning the murders but did not know where she was during the morning of February 17 or what she had done because "she was stoned out" (*id.* at 1304). In August 1970, Posey asked Stoeckley whether she had committed the murders. She responded again that she did not know because she was "stoned out" and did not remember what she had done during the night in question, but that she did not think that she could kill anyone. When Posey suggested that she could have been the female intruder holding the candle, Stoeckley nodded her head in a noncommittal manner (*id.* at 1327-1329).

William Ivory, an Army Criminal Investigation Division (CID) Agent, testified that he had twice interviewed Stoeckley concerning her whereabouts on the night of the murders but that she was unable to recall them because, in her words, she had been "out on marihuana" (Art. 32 Tr. 1513). A military policeman named Kenneth Mica testified that, while enroute to the crime scene at approximately 4:00 a.m.,

he observed a white female with shoulder length hair standing on a street corner near a shopping center. Although unable to discern the woman's facial characteristics, he noticed that she was wearing a dark hooded raincoat and a wide brimmed hat (*id.* at 1007, 1023, 1026). Petitioner also took the stand at the hearing and repeated the story that he had told to investigators following the crime. He was shown Stoeckley's photograph, however, and was unable to identify her (*id.* at M26-M28, M141; Tr. 6829-6830).

At the completion of the Article 32 hearing, the investigating officer recommended that the charges against petitioner be dismissed but that law enforcement authorities continue their investigation of Stoeckley's activities on the night of the murders. On October 23, 1970, after review of the investigating officer's report, the Commanding General of petitioner's unit dismissed the charges for insufficient evidence to justify their reference to trial by court martial. Petitioner was honorably discharged in December 1970. In accordance with the recommendation of the Article 32 officer, Army investigators continued their investigation of Stoeckley. In April 1971, Agent Robert Brisentine conducted two interviews with Stoeckley at her new residence in Nashville, Tennessee. No evidence was uncovered linking Stoeckley to the murders, however. In the meanwhile, further evidence pointed to petitioner's guilt, and the investigation concluded with his indictment in 1975.

3. Stoeckley was called as a defense witness at petitioner's trial. She testified that during 1970 she was addicted to heroin and used other drugs (J.A. 1014). Explaining that she had ingested large quantities of drugs the prior evening, she then testified that she had no recollection of her whereabouts between midnight and 4:30 a.m. on February 17, 1970 (J.A. 1040, 1043-1049, 1136). She denied any involvement in the murders of petitioner's family and admitted that

her knowledge of the killings was a product of what she had heard on the radio and what others had told her (J.A. 1142-1144).

Following this testimony, petitioner moved to be permitted to introduce, as statements against penal interest under Fed. R. Evid. 804(b)(3), the hearsay testimony of several witnesses as to out-of-court statements made to them by Stoeckley concerning the murders. The court then conducted a proceeding outside the presence of the jury at which it heard the proffered testimony. Officer Beasley testified to the contents of his conversation with Stoeckley on the day after the murders (see page 3, *supra*). William Posey testified to the contents of his conversation with Stoeckley about a week after the murders, which he had related at the Article 32 hearing (see page 4, *supra*).[4]

Agent Brisentine testified concerning his interviews with Stoeckley in April 1971. He testified that at the first interview, during which she appeared to be under the influence of narcotics (J.A. 1210), Stoeckley had told him that she could not remember her activities on the night of the murders due to a "mental block" and that she had taken LSD and mescaline that night (J.A. 1203-1204). She also stated that she believed she might have been present at the murders, explaining that she had dreams in which she saw herself in the MacDonald home with petitioner holding a bloody icepick, and that she had heard prior to the murders that the "hippie element" was angry with petitioner (J.A.

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[4]There was some variance between Posey's testimony at the Article 32 hearing and at trial. While he had originally testified that he suggested to Stoeckley that she might have held the candle, at trial he testified that Stoeckley herself had stated that she might have held the candle (J.A.1240). He also testified at trial that Stoeckley had mentioned to him the presence of a broken hobby horse in the MacDonald residence (J.A. 1241), although he did not mention this in his original testimony.

1203-1206). She later retracted this statement, however, explaining that "she only thinks she heard of [petitioner] before the murders" (J.A. 1204). Agent Brisentine also testified that Stoeckley told him that she knew the identity of the persons who murdered the MacDonald family and that she would furnish the identity of the murderers in exchange for immunity (J.A. 1207). The following day, Stoeckley recanted her statement concerning participation in the murders. Asserting that she had "said too much," she admitted that she had been lying when she told Agent Brisentine that she knew the identities of the killers; in fact she only suspected some people of committing the homicides (J.A. 1207-1209).[5]

In addition, three acquaintances of Stoeckley's testified as to statements she had made to them when she was living in Nashville. In November 1970, while ill with hepatitis (J.A. 1186), "incoherent" (J.A. 1184), and in a state of hysteria, she told Jane Zillioux that she could not return to her home in Fayetteville because she had been involved in some murders with three boys whose identities she did not know (J.A. 1178-1181). When Zillioux pressed her for additional details, Stoeckley admitted that she did not know whether or not she had participated in the murders (J.A. 1178, 1188), explaining (J.A. 1178-1179): "I've been a heavy drug user and * * * [d]rugs make you * * * do things that you don't think you did, * * * I don't know. * * * I can't remember." James Gaddis, a Nashville police officer, testified that Stoeckley told him that, on the night of the murders, she had "tripped out" on LSD and mescaline but remembered being at the scene of the crime (J.A. 1189). On other occasions, she denied involvement in the murders, stated that she could not recall her whereabouts on the night

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[5]Agent Brisentine subsequently investigated the persons named by Stoeckley as "suspects," but no information linking them to the murders was uncovered (J.A. 1215-1216).

in question, or asserted that she knew who had committed the crimes (J.A. 1189-1193). At other times, she admitted that she only had suspicions as to the identity of the killers or stated that she believed that the killer was petitioner (J.A. 1193). Charles Underhill, a neighbor, testified that in late 1970 he encountered Stoeckley sobbing hysterically in her apartment (J.A. 1196-1197). When he inquired what was wrong, she stated (J.A. 1197): "They killed her and the two children."

Finally, a member of the defense team testified that Stoeckley stated two days after her trial testimony that she still thought she could have been in the MacDonald home at the time of the murders because the pictures of the MacDonald children and the rocking horse seemed familiar (J.A. 1260-1261). During a second interview, Stoeckley again stated that she thought she might have been in the MacDonald home, explaining that she remembered standing at the couch holding a candle, "[o]nly it wasn't dripping wax, it was dripping blood" (J.A. 1264, 1273).

After reviewing this testimony and Stoeckley's testimony, the trial judge denied petitioner's motion to introduce the hearsay testimony of these witnesses on the ground that it did not meet the trustworthiness requirement of Rule 804(b)(3) (Tr. 5806-5807). Following his conviction, petitioner filed a motion to vacate the judgment on the ground, inter alia, that the court had erred in excluding this testimony. The court denied the motion (Pet. App. 32a-40a), holding that "far from being shown by corroborating circumstances to be clearly trustworthy, the alleged statements of Stoeckley were * * * clearly untrustworthy" (*id.* at 37a).

4. The court of appeals affirmed (Pet. App. 1a-19a). Noting that Fed. R. Evid. 804(b)(3) places upon the proponent of a statement against interest the "formidable burden" of establishing that the statement is clearly trustworthy so

as to foreclose the possibility of fabrication, it held that Stoeckley's "longstanding drug habits made her an inherently unreliable witness" and that "her vacillation about whether or not she remembered anything at all about the night of crime lends force to the view that everything she has said and done in this regard was a product of her drug addiction" (Pet. App. 18a). Accordingly, the court found that the trial judge did not abuse his discretion in holding that petitioner had not met his burden under the rule. Judge Murnaghan concurred, stating that he believed the testimony should have been admitted, but agreeing that the trial judge did not abuse his discretion in deciding to exclude it (*id.* at 20a-24a).

ARGUMENT

Petitioner contends (Pet. 11-20) that the trial judge committed reversible error in excluding the hearsay testimony concerning the making of statements by Stoeckley that suggested that she participated in the murders. This contention is without merit.

1. a. The crux of petitioner's contention is that a declaration against interest is always admissible under Rule 804(b)(3) if the contents of the statement are corroborated to some degree by circumstantial evidence, and hence that evidence concerning the declarant's own reliability is irrelevant (see Pet. 12-16). Rule 804(b)(3) unequivocally states, however, that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances *clearly indicate the trustworthiness of the statement*" (emphasis added).[6] Nothing in the language of the rule or in its legislative history suggests that the trial judge should blind himself

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[6]This strict test is the product of a change made by Congress in the text of the rule. The rule as submitted to Congress by this Court stated that declarations against penal interest offered to exculpate the accused were not admissible "unless corroborated." Because Congress believed

to evidence probative of the trustworthiness of the statement because it concerns the declarant's own reliability or that the rule should be read as though it prohibits consideration of evidence suggesting untrustworthiness so long as there is some corroboration.

In fact, there is substantial authority for the proposition that the rule's requirement of trustworthiness focuses upon the "trustworthiness of the declarant." *United States* v. *Atkins*, 558 F.2d 133, 135 (3d Cir.), cert. denied, 434 U.S. 929 (1977). See also *United States* v. *Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978); *United States* v. *Satterfield*, 572 F.2d 687, 692 (9th Cir.), cert. denied, 439 U.S. 840 (1978). Hence, in determining whether a trial judge abused his discretion in excluding evidence proffered under Rule 804(b)(3), the courts of appeals have repeatedly considered factors relating to the declarant's reliability and credibility at the time the statements were made, including his mental state and use of drugs or alcohol. See, e.g., *United States* v. *Poland*, 659 F.2d 884, 895 (9th Cir.), cert. denied, 454 U.S. 1059 (1981) (drug addiction, bad criminal record, psychiatric problems, and emotional disorders); *United States* v. *Palumbo*, 639 F.2d 123, 133 (3d Cir.), cert. denied, 454 U.S. 819 (1981) (Adams, J., concurring) (drug use, treatment for psychological disorders); *United States* v. *Guillette*, 547 F.2d 743, 754 (2d Cir. 1976), cert. denied, 434 U.S. 839 (1977) (intoxication); *United States* v. *Sheard*, 473 F.2d 139, 149 (D.C. Cir. 1972), cert. denied, 412 U.S. 943 (1973) (intoxicated, highly susceptible to leading

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that this language was not adequate to insure trustworthiness, it amended the rule to require that the corroboration "clearly indicate the trustworthiness of the statement." See H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 16 (1974).

questions).[7] Thus, the trial court did not err here in considering as relevant to the Rule 804(b)(3) admissibility question Stoeckley's use of drugs and her contemporaneous statements contradicting the statements sought to be admitted.

b. Petitioner also contends (Pet. 16-18) that, even if it was proper for the trial court to consider Stoeckley's contradictory statements and the evidence of her unreliability, the court committed reversible error in concluding that this evidence warranted exclusion of the hearsay testimony. This fact-bound contention was fully considered and correctly rejected by both courts below, and further review by

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[7]Petitioner's reliance (Pet. 14) upon *United States* v. *Satterfield, supra*, 572 F.2d at 692, is based entirely on a quotation taken out of context. In fact, Satterfield is directly contrary to petitioner's contention that evidence of the declarant's reliability is irrelevant to the Rule 804(b)(3) determination of trustworthiness. The *Satterfield* court held that it is improper for the trial judge to pass on the credibility of the *witness* who is to testify concerning the declarant's statement. It affirmed the trial court's determination that the declarant's statements were inadmissible under Rule 804(b)(3) because "clear circumstances corroborating [the declarant's] veracity were absent." 572 F.2d at 692. Likewise, Judge Weinstein's treatise lends no support to petitioner's contention. It also distinguishes between the trial court's refusal to admit statements against penal interest due to the *declarant's* unreliability, which it finds proper, and the court's refusal to admit such statements due to the *witness's* unreliability, which it finds an improper exercise of the court's discretion. 4 J. Weinstein & M. Berger, *Weinstein's Evidence* para. 804(b)(3)[03], at 108-109 (1981). Finally, *United States* v. *Thomas*, 571 F.2d 285, 290 (5th Cir. 1978), *United States* v. *Atkins, supra*, 558 F.2d at 135-136, and *United States* v. *Goodlow*, 500 F.2d 954, 958 (8th Cir. 1974), are not "irreconcilable with the case at bar" as petitioner maintains (Pet. 15 n.14). Each of these cases holds no more than that the particular corroborating circumstances there provided sufficient indicia of trustworthiness to warrant the admission of statements against the declarant's penal interest. None of those cases suggests that it is improper for the trial judge to consider the declarant's own reliability in making his assessment. Indeed, in *United States* v. *Atkins, supra*, 558 F.2d at 135, the court observed that "Rule 804(b)(3) directs the court to the trustworthiness of the declarant * * *."

this Court is unwarranted. As the court of appeals recognized (Pet. App. 17a), the standard for appellate review of the failure to admit hearsay evidence under Rule 804(b)(3) is whether the trial court abused its discretion. See *United States* v. *Beltempo*, 675 F.2d 472, 480 (2d Cir. 1982); *United States* v. *Poland, supra*, 659 F.2d at 895. Applying this standard, it cannot seriously be contended that the trial judge here abused his discretion in ruling that Stoeckley's declarations were not admissible.

First, it is well recognized that a statement against interest should not be admitted unless the declarant has firsthand knowledge of the underlying facts. See *United States* v. *Lang*, 589 F.2d 92, 98 (2d Cir. 1978), citing 4 J. Weinstein & M. Berger, *Weinstein's Evidence* para. 804(b)(3) [02] (1977). Stoeckley testified at trial that, as a result of a drug-induced stupor, she had no knowledge of her whereabouts between midnight and 4:30 a.m. on the night of the murders (J.A. 1048-1049).[8] The trial judge thus had no basis to believe that Stoeckley had any firsthand knowledge of the murders of petitioner's family.

Moreover, it is undisputed that Stoeckley was addicted to narcotics and used hallucinogenic drugs throughout the period in question (see Pet. 16-17), which surely casts doubt on the reliability of her statements. See *United States* v. *Poland, supra*, 659 F.2d at 895; *United States* v. *Palumbo, supra*, 639 F.2d at 133 (Adams, J., concurring). Indeed, as the district court noted (Pet. App. 38a), some of the proffered statements themselves were made when she appeared

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[8]This testimony was fully consistent with the statement Stoeckley made to Officer Beasley the morning following commission of the murders and her other statements to acquaintances (see, e.g., J.A. 1189-1193 (Gaddis); 1203-1204 (Brisentine); 1178-1180 (Zillioux); 1251 (Posey)).

to be under the influence of narcotics (see J.A. 1210 (Brisentine); J.A. 1192 (Gaddis)). She was described by some witnesses as "blubbering," "incoherent," or "hysterical" while she was talking to them (see Pet. App. 34a; J.A. 1179-1184, 1196-1197, 1199). Thus, the circumstances in which Stoeckley's out-of-court statements were made did not "clearly indicate" that they were trustworthy; on the contrary they suggest a recounting of dreams or drug-induced hallucinations rather than events in which she actually participated.[9]

Most significantly, Stoeckley's statements standing alone were inherently untrustworthy because of their vague and contradictory nature. On most of the occasions that Stoeckley suggested that she participated in the murders, she promptly retracted the statement. For example, the day after she told Agent Brisentine that she might have been present during the murders, she recanted and admitted that even her suggestion that she knew the identities of the participants had been a lie (see page 7, *supra*); after telling Officer Gaddis that she was present when the murders took place, she told him on other occasions that she was not involved and that she believed petitioner himself was the murderer (see pages 7-8, *supra*); and after telling Zillioux that she had been involved in some murders, she stated that she had no knowledge of the events (see page 7, *supra*). Under these circumstances, the district court plainly did not abuse its discretion in concluding that corroborating

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[9]For example, she told Officer Beasley that "[i]n my mind, it seems that I saw this thing happen; [but] I was heavy on mescaline." J.A. 1223; see also J.A. 1204-1205, 1240-1241, 1273.

circumstances did not "clearly indicate" the trustworthiness of Stoeckley's statements.[10]

2. Petitioner also contends (Pet. 18-20) that, whatever the proper interpretation of Rule 804(b)(3), exclusion of Stoeckley's testimony violates due process under this Court's decision in *Chambers* v. *Mississippi*, 410 U.S. 284 (1973). This contention is without merit.

In *Chambers*, a third party had confessed orally and in writing to commission of the murder for which the defendant was on trial. One of the three close acquaintances to whom the declarant had made a spontaneous oral admission claimed to have seen him shoot the victim. Other evidence showed that the declarant owned a pistol that was the same caliber as the murder weapon and that he had been seen with a firearm shortly before the crime. At trial, the declarant, who was called as a defense witness, renounced his written confession and denied committing the crime. Because of a state voucher rule, the defense was precluded

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[10]We note that the items listed by petitioner (Pet. 8-10) as corroborative factors provide little, if any, circumstantial support for a finding of trustworthiness. The fact that Stoeckley allegedly made some statements concerning the crime scene, namely, that there was a hobby horse in the room of one of the children and that the word "pig" was written on the headboard of a bed, does not demonstrate any "insider's knowledge" of the crime scene. Details of the crime were broadcast in the news media the day after the murders, and a picture of the crime scene published in the local newspapers showed the hobby horse. Indeed, Stoeckley incorrectly described the manner in which the word "pig" was written (J.A. 1213), and Agent Brisentine testified that she was unable to provide any information about the inside of the MacDonald residence that indicated any "insider's knowledge." While Stoeckley loosely fit petitioner's vague description of the intruder, petitioner had failed to identify her photograph at the Article 32 hearing. And although wax drippings of an undetermined origin were found at the crime scene, the MacDonald family frequently burned candles, and a number of partially consumed candles were found in their home (Tr. 3837-3841).

from cross-examining the declarant concerning his confession or his whereabouts at the time of the crime. And, because statements against penal interest were considered inadmissible hearsay under state evidentiary rules, testimony concerning his oral admissions was also excluded. Finding that the application of the hearsay rule coupled with the court's failure to permit cross-examination of the declarant violated the Due Process Clause, this Court reversed the conviction. In holding that the declarant's admissions to friends should have been allowed in evidence, the Court reasoned that the statements possessed substantial guarantees of trustworthiness because they were made spontaneously to close acquaintances shortly after the murder and were substantially corroborated by other evidence—a sworn confession, the testimony of an eyewitness that the declarant fired the shots, and the evidence of the declarant's possession of a pistol that could have been the murder weapon. 410 U.S. at 300. Moreover, the Court added, "if there was any question about the truthfulness of the extrajudicial statements, [the declarant] * * * could have been cross-examined by the State * * *." *Id.* at 301.

Clearly, *Chambers* does not remotely suggest that petitioner was denied due process. Rule 804(b)(3) recognizes that declarations against penal interest are admissible if corroborating circumstances clearly indicate their trustworthiness, as was the case in *Chambers*. As discussed above, no corroboration approaching that in *Chambers* is found here; to the contrary, the district court correctly found that, "far from being shown by corroborating circumstances to be clearly trustworthy, the alleged statements of Stoeckley were * * * clearly untrustworthy" (Pet. App. 37a). In addition, in *Chambers* the Court deemed it significant for purposes of the admissibility of the hearsay statements that the declarant was present in court and subject to cross-examination by the state concerning the truthfulness

of the extra-judicial statements. Here, however, Stoeckley was not meaningfully available for comparable cross-examination by the prosecution because of her lack of recollection. Indeed, petitioner has always maintained that Stoeckley was unavailable as a witness and both courts below agreed with that contention (see Pet. App. 16a & n.14, 36a); if not, Rule 804(b)(3) could not have been invoked at all.

Moreover, the *Chambers* Court concluded that a due process violation resulted from the combined effects of the application of the hearsay rule and the state voucher rule that precluded effective examination of the declarant by the defense. By contrast, petitioner was not impeded in his examination of Stoeckley. Petitioner's counsel extensively questioned her concerning her alleged memory lapse, her whereabouts on the night of the crime, her conversations with others concerning the murders, her reasons for going to Tennessee following the crime, her disposal of her floppy hat and a blonde wig, and her association with members of the hippie community who might have resembled the alleged male intruders (see J.A. 1045-1070, 1080-1082, 1090-1097). Under these circumstances, *Chambers* plainly is not controlling. See also *United States* v. *Hinkson*, 632 F.2d 382, 386 (4th Cir. 1980) (defendant's freedom to cross-examine the declarant "greatly ameliorated" his inability to introduce the declarant's out-of-court admissions).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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